EXHIBIT E

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
TYLER DIVISION

ERIC M. ALBRITTON, Plaintiff, v. (1) CISCO SYSTEMS, INC., (2) RICHARD FRENKEL, (3) MALLUN YEN and (4) JOHN NOH, Defendants.	§ § § § § § § § § § §	NO. 6:08-CV-00089

EXPERT REPORT OF PROFESSOR CHARLES SILVER

I, Charles Silver, state as follows:

1. I submit this Expert Report to rebut certain opinions expressed in the Report of Charles Herring, Jr. I take up the opinions in the order he states them. Because Mr. Herring often fails to state grounds for his opinions, my ability to respond to his conclusions is limited. I reserve the right to expand this report in light of changes in Mr. Herring's Report or after receiving additional information. My credentials and a list of the documents I reviewed appear in an appendix.

2. I assume the facts as Mr. Herring asserts them to be. I take no position on the accuracy of his statement of the facts. I add a few facts Mr. Herring does not mention. One is that Cisco Systems, the defendant in the underlying litigation, never challenged the propriety of the decision of the administrative clerk for the Tyler Division of the Eastern District of Texas to change the filing date on the docket to October 16, 2007. Cisco Systems neither asked the administrative clerk to re-set the date to October 15, 2007 nor filed a motion with the court

requesting this relief. Another is that Cisco Systems through its agents or employees learned about the administrative clerk's action soon after it occurred. I also assume a few other facts which I mention below.

3. In my judgment, Mr. Albritton's actions (and those of his paralegal, Amie Mathis) were completely proper under the Texas Disciplinary Rules of Professional Conduct (TDRs). No violation of the TDRs is even arguable. A lawyer (or a person employed by a lawyer) is always free to ask a court's administrative clerk for help with an administrative matter. This is obviously true when the matter is whether a document filed electronically was processed properly. The homepage for the Eastern District of Texas, http://www.txed.uscourts.gov/default.htm, specifically directs lawyers with "filing questions" or "CM/ECF questions" to contact the division where the case was filed. The line under the link for "CM/ECF or PACER login" says "***Please Note:*** For help call the division where the case was filed" (original emphasis). Page 1 of the *Electronic Case Files System User's Manual* (Last revision: April, 2004) states, in bold letters, "**For additional help, please call the division that your case is filed**." A lawyer (or a person acting for a lawyer) with questions about the handling of a complaint filed electronically is supposed to call the division's administrative clerk and ask. That is all Mr. Albritton (acting through Ms. Mathis) did.

4. A lawyer acted similarly in *Garcia v. Garza*, 2006 U.S. Dist. LEXIS 5926 (S.D. Tex—McAllen 2006). A lawyer who misfiled an Adversary Complaint using the United States Bankruptcy Court, Southern District of Texas's CM/ECF system "discovered the error [and] diligently attempted to remedy it with the clerk's office." *Id.* at *13. The court found nothing improper about the contact. To the contrary, the court was impressed by the lawyer's "diligen[ce]" and ruled that the complaint was timely filed, despite the mistake. *Id.* at *14.

Evidently, judges expect lawyers who experience problems with the CM/ECF system to call their administrative clerks, and to do so with dispatch.

5. The worst that could reasonably be said is that the administrative clerk of the Tyler Division made an honest mistake by changing the filing date on the docket administratively, instead of recommending that Mr. Albritton file a motion with the court. (I take no position on whether the clerk made a mistake, but simply assume so for the sake of analysis. According to Shelley Moore, Deputy Clerk for the Texarkana Division, having the clerk at the Tyler Division correct the docket entry was one of two proper means of addressing the mistake. Deposition of Shelley Moore, p. 12:10-15.) Even then, it in no way follows that Mr. Albritton did anything improper. Administrative clerks make mistakes occasionally. A clerk's mistake, assuming one was made, does not change a lawyer's request for assistance into a conspiracy or a violation of the TDRs.

Asserted Violation of TDR 3.04

6. Mr. Herring opines that Mr. Albritton "arguably violated" TDR 3.04(d). Report of Charles Herring, Jr., p. 3. This rule provides that "[a] lawyer shall not ... knowingly disobey ... an obligation under the standing rules of ... a tribunal." The violation occurred, he contends, because Mr. Albritton, acting through an employee, asked the clerk to change an "official record" that bound his client, ESN, LLC. The predicate for this assertion is Mr. Herring's belief that under Local Rule CV-5(a)(3)(B), the filing date in the Notice of Electronic Filing (NEF) was binding on Mr. Albritton's client and the effort to change the docket entry was "arguably inconsistent" with the rule. Report of Charles Herring, Jr., p. 3.

7. There are two problems with this opinion. First, under Rule CV-5(a)(3)(B), "[a] document filed electronically is deemed filed at the date and time stated on the Notice of

Electronic Filing from the court." According to David Maland, "the NEF clearly say[s] 10/16." Deposition of David Maland, p. 59:9-10. If Mr. Herring is right, then, the complaint was filed on October 16th and the docket entry showing October 15th as the filing date was incorrect. A violation of Rule CV-5(a)(3)(B) would therefore have occurred had the mistaken docket entry *not* been changed to reflect the filing date in the NEF.

8. The second problem that Rule CV-5(a)(3)(B) does not govern the propriety of Ms. Mathis' conversation with the administrative clerk. The question is whether Mr. Albritton violated an obligation under a standing rule of the Eastern District of Texas by having Ms. Mathis contact the administrative clerk with the object of having the filing date on the docket changed. Rule CV-5(a)(3)(B) has nothing to say about this. It regulates neither conversations with the court's staff nor the manner in which the date shown in the docket may be changed.

9. To make the matter clearer, suppose Mr. Albritton had filed a motion to amend the filing date in the docket instead of asking the administrative clerk to make the change. Following Mr. Herring's logic, this too would have been a violation of TDR 3.04(d) because it would have contravened Rule CV-5(a)(3)(B). Yet, Mr. Herring believes that such a motion would have been the "better procedure." Report of Charles Herring, Jr., p. 3. Insofar as Rule CV-5(a)(3)(B) is considered, it matters not how a change is made. Either way, a violation of a standing obligation of the tribunal would have occurred.

10. TDR 3.04(d) exists to encourage lawyers to urge clients to conform to court orders requiring identified behaviors or, when a client refuses to comply, to declare the client's refusal openly. Comment 7 to TDR 3.04 provides an example:

> [A] lawyer may acquiesce in a client's position that the sanctions arising from noncompliance [with a judicial order] are preferable to the costs of compliance.

> This situation can arise in criminal cases, for example, *where the court orders disclosure of the identity of an informant to the defendant and the government decides that it would prefer to allow the case to be dismissed rather than to make that disclosure.*

TDR 3.04, Comment 7 (2008) (discussing TDR 3.04(d)) (emphasis added). As the italicized language shows, the point of TDR 3.04 is to encourage compliance with obligations that direct particular behaviors, such as disclosing a witness' name. An official record like an NEF or a docket entry may be binding, but it does not obligate a lawyer or party to act in a particular way. Therefore, it falls outside TDR 3.04.

11. After wrongly contending that Mr. Albritton arguably violated TDR 3.04, Mr. Herring adds related charges that also are incorrect. He suggests that because an employee of Mr. Albritton's firm committed the primary conduct said to violate TDR 3.04, Mr. Albritton also violated TDR 8.04(a)(1), which prohibits a lawyer from using an agent to effect a violation of a TDR, and TDR 5.03(a), which requires a lawyer to take reasonable steps to ensure that a non-lawyer employee acts in conformity with the lawyer's responsibilities. Because there was no violation of TDR 3.04(b), these charges also fail.

Asserted Violation of TDR 8.04(a)(3)

12. Mr. Herring's opines that Mr. Albritton "arguably violated" TDR 8.04(a)(3). Report of Charles Herring, Jr., p. 3. The only discussion of this rule appears on p. 4 of his Report, where he states that the rule "generally prohibits a lawyer from engaging in any conduct that involves [a] misrepresentation." Report of Charles Herring, Jr., p. 4. Although this description of the rule is correct, Mr. Herring neither identifies a misrepresentation made by Mr. Albritton or an employee of Mr. Albritton's firm nor sets out his grounds for believing that TDR 8.04(a)(3) was

transgressed. Consequently, I cannot respond to this opinion. I reserve the right to revise this response.

Asserted Violation of TDR 3.05

13. Mr. Herring opines that Mr. Albritton "arguably violated" TDR 3.05. Report of Charles Herring, Jr., p. 3. The structure of his Report makes it difficult to figure out the nature of the violation alleged. On p. 4, he quotes both TDR 3.05(a), which prohibits a lawyer from "seek[ing] to influence a tribunal concerning a pending matter by means prohibited by law or applicable rules of practice or procedure," and TDR 3.05(b), which regulates ex parte communications. He then cites a number of cases and authorities, adding descriptive parentheticals. Yet, his Report contains no sentence explaining how Mr. Albritton (or a person acting on his behalf) arguably violated TDR 3.05. Nor is there a paragraph setting out the grounds for this opinion. I therefore have great difficulty responding to this opinion. I reserve the right to revise this response.

14. As mentioned, TDR 3.05(a) prohibits a lawyer from "seek[ing] to influence a tribunal concerning a pending matter by means prohibited by law or applicable rules of practice or procedure." To establish an arguable violation of this rule, Mr. Herring would have to identify a law or applicable rule of practice or procedure that prohibited Mr. Albritton (or a person in his employ) from calling a court's administrative clerk and asking for a change in the filing date. I know of no such law or rule, and Mr. Herring does not identify one. Federal Rule of Civil Procedure 77(c)(2)(D) authorizes a clerk to "act on any [] matter that does not require the court's action," Fed. R. Civ. P. 77(c)(2)(D), and the Eastern District's website and manual invited lawyers with questions about CM/ECF to call the division clerk. If Mr. Albritton wondered whether the clerk had the power to change the docket entry, he was free to call and ask, and he

was free to direct a person in his employ to call and ask. The clerk might respond that a motion was required or that the change could be made administratively. It is the administrative clerk's responsibility to know the answer and to indicate the proper course.

15. I suspect that few lawyers know the answer to the question Mr. Albritton faced. Electronic filing is a recent and evolving practice, and the problem concerning the filing date is arcane. The natural impulse of any lawyer in this situation would likely be to call the clerk and ask whether the clerk could change the date to reflect the actual date the complaint was submitted. Whether the clerk agreed or not, the act of calling the clerk to inquire could not possibly support an inference of impropriety. Nor, if the clerk answered affirmatively, could a lawyer be blamed for requesting the change (assuming the absence of force or fraud, neither of which is said by Mr. Herring to be present).

16. The facts indicate that even the clerks were not sure whether they had the power to change the filing date. According to Mr. Herring, "the Texarkana deputy clerk 'was reluctant to change the date, and referred [Mr. Albritton's assistant] to the Tyler clerk's office.... Under the circumstances, the Tyler administrative clerk agreed to modify the date filed for the complaint on the docket sheet to reflect October 16th as the actual filed date for the complaint....'" Report of Charles Herring, Jr., p. 2 (quoting a statement of David Maland, U.S. District Clerk, Eastern District of Texas). Had the (im)propriety of changing the filing date been obvious, the Texarkana deputy clerk would have given a firm answer, instead of referring the assistant to the Tyler clerk. Likewise, had the correct answer been clearly that a motion was required, the Tyler clerk would also have been decisive.

17. Instead of alleging an arguable violation of TDR 3.05(a), Mr. Herring may have meant to opine that Mr. Albritton "arguably violated TDR 3.05(b)." One cannot be sure, for reasons already explained. TDR 3.05(b) states that a lawyer shall not,

> except as otherwise permitted by law and not prohibited by applicable rules of practice or procedure, communicate or cause another to communicate *ex parte* with a tribunal for the purpose of influencing that entity or person concerning a pending matter other than: (1) in the course of official proceedings in the cause; (2) in writing if he promptly delivers a copy of the writing to opposing counsel or the adverse party if he is not represented by a lawyer; (3) orally upon adequate notice to opposing counsel or to the adverse party if he is not represented by a lawyer. .

If Mr. Herring did mean to invoke this part of TDR 3.05, again he did not explain his reasoning. He merely cited some authorities and left the reader the task of applying them to the instant facts. This makes the soundness of his opinion difficult to assess.

18. The first case Mr. Herring cited is *Environmental Defense Fund v. Alexander*, 614 F.2d 474, 481 (5th Cir. 1980). On reading this opinion, I found no reference to TDR 3.05. Consequently, I am uncertain how the *Alexander* case bears on Mr. Herring's opinion that an arguable violation of TDR 3.05 occurred.

19. The facts of *Alexander* did not enlighten me either. The following paragraph describes the ex parte communication that occurred there.

> Buttressed only by factual affidavits filed in this court for the first time, in disregard of our function as an appellate court, one of plaintiff's counsel asserts that he spoke to one of the judge's law clerks who told counsel that the judge did not plan to take evidence on any issue but the authorization for the project at the

hearing and that all other issues including affirmative defenses would be heard later.

Id., 614 F.2d at 480-481. These facts differ importantly from those at issue here. For one thing, the conversation in *Alexander* involved the trial judge's law clerk, not the administrative clerk. For another, the conversation concerned the manner in which the district court judge would handle a hearing on the merits. This was not a routine matter of case administration such as is normally entrusted to an administrative clerk.

20. The second case Mr. Herring cited is *In the Matter of J.B.K., Attorney, Relator*, 931 S.W.2d 581 (Tex. App.—El Paso 1996, no writ). This case does cite TDR 3.05(b), but the facts again bear no relation to this case. The opinion summarizes the communication at issue:

> After submission of a matter before this Court in which J.B.K. served as counsel for a party and presented oral argument, but prior to the date of issuance of the opinion in that matter, J.B.K. engaged in *ex parte* contact with the Eighth District Court of Appeals by communicating directly with a member of the Court's staff who was his acquaintance. The *ex parte* communication occurred on Monday, February 26, 1996. The opinion was delivered on February 29, 1996. The telephonic communication with the staff member was for the purpose of inquiring, among other things, as to what his "chances" were in the then pending case and whether he should "settle" his case prior to the issuance of the opinion.

Id., 931 S.W.2d at 583. The opinion does not say whether the "staff member" was an administrative clerk, a law clerk, or someone else in the court's employ. (One must infer that the employee, whoever he or she was, held a position other than a purely administrative role.)

21. The court of appeals condemned the conversation, but its reason for doing so bears no connection to this case.

> Private communications between a lawyer in a pending action and a staff member of an appellate court before whom the case is pending concerning the merits of the then pending appeal are "*ex parte* communications" not authorized by law. [Citations omitted.] Accordingly, we find as a matter of law that any attempt to solicit or receive information on the merits of a pending case from a staff member of an appellate court constitutes an impermissible *ex parte* communication with chambers."

Id., 931 S.W.2d at 584. Here, no one requested inside information about the court's likely ruling on a pending matter; no motion or other item calling for a ruling was even pending. Given its facts, *J.B.K.* cannot establish an arguable violation of TDR 3.05(b) by Mr. Albritton (or his employee).

22. *J.B.K.* can, however, generate an inference that *no* violation occurred. On reading the opinion, I saw that the court felt compelled by the Code of Judicial Conduct to report the lawyer's misconduct to the State Bar of Texas because the lawyer's actions raised a substantial question as to the lawyer's honesty, trustworthiness or fitness as a lawyer. As the court explained:

> A judge who receives information clearly establishing that a lawyer has committed a violation of the Texas Rules of Professional Conduct should take appropriate action. If the information received by that judge raises a substantial question as to the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, the judge **shall** inform the Office of the General Counsel of the State Bar

> of Texas or take other appropriate action. TEXAS SUPREME COURT, CODE OF JUDICIAL CONDUCT, Canon 3D(2), Amended to Sept. 1, 1994, reprinted at TEX.GOV'T CODE ANN. tit. 2, subtit. G, app. B (Vernon Supp.1996). We find that the allegations set forth above, if true, raise a substantial question as to Counsel's honesty, trustworthiness or fitness as a lawyer.

Id., 931 S.W.2d at 584 (emphasis in original). The TDRs contain an identical provision. TDR 8.03(a) reads as follows:

> [A] lawyer having knowledge that another lawyer has committed a violation of applicable rules of professional conduct that raises a substantial question as to that lawyers honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate disciplinary authority.

TDR 8.03(a) (2008). Although I am not an expert in criminal law, the Patent Troll Tracker's assertion that Mr. Albritton conspired with the Eastern District's court clerk to alter a federal record seems to me to allege criminal wrongdoing. See 18 USCS § 1512(c) ("Whoever corruptly ... alters ... a record ... with the intent to impair the object's integrity or availability for use in an official proceeding; or ... otherwise obstructs, influences, or impedes any official proceeding, or attempts to do so, shall be fined under this title or imprisoned not more than 20 years, or both."[1] If that is right, then a lawyer who knew that such a conspiracy occurred had a duty to report Mr. Albritton to the General Counsel of the State Bar of Texas. To my knowledge, no lawyer filed a report. The natural inference is that all Texas lawyers engaged by Cisco Systems did not find the communication itself problematic.

[1] This may be why David Maland, the United States District Clerk for the Eastern District of Texas, was "concerned" by "the allegation that there had been some collusion between Mr. Albritton and me or my office." Deposition of David Maland, p. 44, 18-24.

23. The complaint alleges that Mr. Richard Frenkel "is an attorney licensed to practice law in the State of California." *Plaintiff's Original Petition*, p. 3. On checking the California disciplinary rules, I found no counterpart to TDR 8.03. One might infer from this that Mr. Frenkel had no duty to report serious misconduct by other lawyers of which he was aware. However, he could have reported, despite having no duty to do so, and reporting would have been the better practice, had he truly thought that serious misconduct occurred. See *Restatement (Third) of the Law Governing Lawyers* § 5(3) ("A lawyer who knows of another lawyer's violation of applicable rules of professional conduct raising a substantial question of the lawyer's honesty or trustworthiness or the lawyer's fitness as a lawyer in some other respect must report that information to appropriate disciplinary authorities.").

24. Nor did Cisco Systems lodge a complaint against Mr. Albritton in the Eastern District of Texas. According to Local Rule AT-2(d)(1)(B) & (C), the trial court "may ... take any appropriate disciplinary action against any attorney ... for failure to comply with ... any [] rule or order of this court;" and "for unethical behavior[.]" The court's contempt power may also have been available. Again given that a conspiracy between a lawyer and an administrative clerk to alter a court record improperly would constitute a crime, Cisco System's lack of action in the Eastern District of Texas poses a quandary. Why did it not bring the alleged misconduct to the court's attention for remediation? The alteration itself was no secret. The Patent Troll Tracker made it known to the world. If, on the other hand, there was no criminal conspiracy, Cisco System's failure to act is understandable, even commendable.

25. Mr. Herring next cited § 113 of the *Restatement (Third) of the Law Governing Lawyers*. Report of Charles Herring, Jr., pp. 4-5. He first quoted the general principle of § 113(1), which states that "[a] lawyer may not knowingly communicate ex parte with a judicial officer before

whom a proceeding is pending concerning the matter, except as authorized by law." The obvious issue under this principle is whether the phone call was "authorized by law." I have explained why, in my opinion, it was.

26. Mr. Herring then quoted part of Comment *c* to § 113: "The prohibition applies to communication about the merits of the cause and to communications about a procedural matter the resolution of which will provide the party making the communication substantial tactical or strategic advantage." He omitted the following sentence, which immediately succeeds the one he quoted: "The prohibition [in § 113] does not apply to routine and customary communications for the purpose of scheduling a hearing or similar communications, but does apply to communications for the purpose of having a matter assigned to a particular court or judge." *Restatement (Third) of the Law Governing Lawyers* § 113, Comment *c*. Because of the many sources that invited lawyers with questions about CM/ECF to contact the division's administrative clerk, the communication at issue was clearly "routine and customary." A communication publicly invited by a court cannot be a prohibited ex parte contact.

27. Mr. Herring also cites several other authorities I have not yet discussed. Most of these references appear in a long footnote. Report of Charles Herring, Jr., p. 5, n. 3. On reading the parentheticals that accompany the citations, I decided that these cases roam too far afield of the main point to be worth pursuing. Mr. Herring also failed to include any analysis explaining the applicability of these cases to the matter at hand. I reserve the right to address them in a supplemental report should Mr. Herring explain their relevance to his opinion.

I declare under penalty of perjury of the laws of the United States that the foregoing is true and correct.

Executed on: 11/24/08

Date

Charles Silver

Past Testimonial Experiences

Case Name	Cause Number	Court	Subject	Year
Brown Rudnick Berlack Israels et al. v. Commonwealth of Massachusetts			Attorneys' Fees	2003
Phelps Dunbar, LLP v. Brittany Ins. Co. Ltd, et al.,		U.S. Dist. Ct. for the Southern Dist. Of Texas	Insurance Defense Ethics	2004
ESTEVAN LEAL and DENISE LEAL vs.ALLSTATE INSURANCE COMPANY, et al.	CV99-11924	CENTRAL DISTRICT OF CALIFORNIA, SANTA ANA DIVISION, SUPERIOR COURT OF ARIZONA, MARICOPA COUNTY	Insurance Litigation Issues	2004
COOPER & SCULLY. P.C. VS. SCOTT SUMMY; BARON & BUDD, P.C., et al	03-04408-J	DALLAS COUNTY, TEXAS, 191ST JUDICIAL DISTRICT	Professional Responsibility Issues relating to Lateral Attorney	2005
KARIN JACOBS, et al., VS. WILLIAM K. TAPSCOTT, JR., et al.,	3:04-CV-1968-D	UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION	Professional Responsibility Issues relating to Settlement of Litigation	2006
Bergthold v. Winstead Sechrest & Minick, PC (Winstead)	236-214765-05	IN THE DISTRICT COURT OF 236TH JUDICIAL DISTRICT, TARRANT COUNTY, TEXAS	Insurance Defense Ethics	2007
Thomas a. Dardas, et al. v. Fleming, Hovenkamp & Grayson, P.C., et al.	2002-19156	61st Judicial District Court of Harris County, Texas	Professional Responsibility Issues relating to Fee Sharing	2007
IN RE: TRIGEM AMERICA CORPORATION, Debtor.	SA 05-13972-TA, CHAPTER 11	UNITED STATES BANKRUPTCY COURT, CENTRAL DISTRICT OF CALIFORNIA, SANTA ANA DIVISION	Class Action Issues	2007
Jerry Bergthold v. Winstead Sechrest & Minick, P.C.	236-214765-05	236th Judicial District, Tarrant County, TX	Professional Responsibility	2007
Thomas A. Dardas et al. v. Fleming, Hovenkamp & Grayson, P.C., et al.	2002-19156	61st Judicial District, Harris County, TX	Attorneys' Fees	2007

Past Testimonial Experiences

Case Name	Cause Number	Court	Subject	Year
Whiteside v. Atlanta Cas. Co.	4:07-CV-87 (CDL)	U.S. District Court, Middle District of GA	Insurance Defense Ethics	2007

DOCUMENTS REVIEWED

In addition to cases and authorities cited in my report, I also reviewed the documents below which, unless noted otherwise, relate specifically to this case.

- Deposition of Shelley Moore
- Deposition of David Maland
- Deposition of Peggy Thompson
- Plaintiff's Original Petition
- Electronic Case Files User Manual
- Eastern District of Texas webpages
- Report of Charles Herring, Jr.
- Brenda Sapino Jeffreys, John Council and Miriam Rozen, Patent Attorneys Sue Cisco and Blogging In-House Lawyer for Defamation, 03-17-2008 (as reprinted on Law.com)
- Maland Memo Re: Filing Sealed Documents in Patent Cases
- Maland Memo and Exhibits Re: 5:07cv156 ESN LLC v. Cisco Systems, Inc.
- U. S. DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS, LOCAL RULES AND APPENDIXES as of May 9, 2008
- The Attorney's "How To" Guide for – Civil Case Opening –Texas Eastern District Court, January 11, 2008

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ACADEMIC EMPLOYMENTS

UNIVERSITY OF TEXAS SCHOOL OF LAW

Roy W. and Eugenia C. McDonald Endowed Chair in Civil Procedure	2004-present
Co-Director, Center on Lawyers, Civil Justice, and the Media	2001-present
Robert W. Calvert Faculty Fellow	2000-2004
Cecil D. Redford Professor	1994-2004
W. James Kronzer Chair in Trial & Appellate Advocacy	Summer 1994
Graves, Dougherty, Hearon & Moody Centennial Faculty Fellow	1991-1992
Assistant Professor	1987-1991

VANDERBILT UNIVERSITY LAW SCHOOL

Visiting Professor	2003

UNIVERSITY OF MICHIGAN LAW SCHOOL

Visiting Professor	1994

UNIVERSITY OF CHICAGO

Managing Editor, Ethics: A Journal of Social, Political and Legal Philosophy	1983-1984

EDUCATION

JD 1987, Yale Law School
MA 1981, University of Chicago (Political Science)
BA 1979, University of Florida (Political Science)

PUBLICATIONS

1. "The Impact of the2003 Texas Medical Malpractice Damages Cap on Physician Supply and Insurer Payouts: Separating Facts from Rhetoric," 44 The Advocate 25 (2008) (with David A. Hyman and Bernard Black).

2. "Estimating the Effect of Damage Caps in Medical Malpractice Cases: Evidence from Texas," J. Legal Analysis (forthcoming 2008) (with David A. Hyman, Bernard S. Black, and William M. Sage) (inaugural issue) (peer-reviewed).

3. "Defense Costs and Insurer Reserves in Medical Malpractice and Other Personal Injury Cases: Evidence from Texas, 1988-2004," Amer. Law & Econ. Rev. 1 (2008) (with Bernard Black, David A. Hyman, and William M. Sage) (peer-reviewed).

4. "Incentivizing Institutional Investors to Serve as Lead Plaintiffs in Securities Fraud Class Actions," 57 DePaul Law Review 471 (2008) (with Sam Dinkin) (invited symposium).

5. "Malpractice Payouts and Malpractice Insurance: Evidence from Texas Closed Claims, 1990-2003," 33 Geneva Papers on Risk and Insurance: Issues and Practice 177-192 (2008) (with David A. Hyman, Bernard S. Black, William M. Sage and Kathryn Zeiler) (peer-reviewed).

6. "Physicians' Insurance Limits and Malpractice Payments: Evidence from Texas Closed Claims 1990-2003," 36 J. Legal Stud. 59 (2007) (with Bernard Black, David A. Hyman, William Sage, and Kathryn Zeiler) (peer-reviewed).

7. "Do Defendants Pay What Juries Award? Post-Verdict Haircuts in Texas Medical Malpractice Cases, 1988-2003," J. Empirical Legal Stud. 3-68 (2007) (with Bernard Black, David A. Hyman, William M. Sage, and Kathryn Zeiler) (peer-reviewed).

8. "The Allocation Problem in Multiple-Claimant Representations," 14 S. Ct. Econ. Rev. 95 (2006) (with Paul Edelman and Richard Nagareda) (peer-reviewed).

9. "Dissent from Recommendation to Set Fees Ex Post," 25 Rev. of Litig. 497 (2006) (accompanied Task Force on Contingent Fees, Tort Trial and Insurance Practice Section of the American Bar Association, "Report on Contingent Fees in Class Action Litigation," 25 Rev. of Litig. 459 (2006)).

10. "In Texas, Life is Cheap," 59 Vanderbilt L. Rev. 1875 (2006) (with Frank Cross) (invited symposium).

11. "Medical Malpractice Litigation and Tort Reform: It's the Incentives, Stupid," 59 Vanderbilt L. Rev. 1085 (2006) (with David A. Hyman) (invited symposium).

12. "A Rejoinder to Lester Brickman: *On the Theory Class's Theories of Asbestos Litigation,*" 32 Pepp. L. Rev. 765 (2005).

13. "Medical Malpractice Reform Redux: Déjà Vu All Over Again?" XII Widener L. J. 121 (2005) (with David A. Hyman) (invited symposium).

14. "Stability, Not Crisis: Medical Malpractice Claim Outcomes in Texas, 1988-2002," 2 J. Empirical Legal Stud. 207–259 (July 2005) (with Bernard Black, David A. Hyman, and William S. Sage) (peer-reviewed).

15. "Speak Not of Error, Regulation (Spring 2005) (with David A. Hyman).

16. "The Poor State of Health Care Quality in the U.S.: Is Malpractice Liability Part of the Problem or Part of the Solution?," 90 Cornell L. Rev. 893 (2005) (with David A. Hyman).

17. "Merging Roles: Mass Tort Lawyers as Agents and Trustees," 31 Pepp. L. Rev. 301 (2004) (invited symposium).

18. "Believing Six Improbable Things: Medical Malpractice and 'Legal Fear,'" 28 Harv. J. L. and Pub. Pol. 107 (2004) (with David A. Hyman) (invited symposium).

19. "We're Scared To Death: Class Certification and Blackmail," 78 N.Y.U. L. Rev. 1357 (2003).

20. Practical Guide for Insurance Defense Lawyers, International Association of Defense Counsel (2002) (with Ellen S. Pryor and Kent D. Syverud) (published on the IADC website in 2003 and revised and distributed to all IADC members as a supplement to the Defense Counsel J. in January 2004).

21. "When Should Government Regulate Lawyer-Client Relationships? The Campaign to Prevent Insurers from Managing Defense Costs," 44 Ariz. L. Rev. 787 (2002) (invited symposium).

22. "Introduction: Civil Justice Fact and Fiction," 80 Tex. L. Rev. 1537 (2002) (with Lynn A. Baker).

23. "Does Civil Justice Cost Too Much?" 80 Tex. L. Rev. 2073 (2002).

24. "Defense Lawyers' Professional Responsibilities: Part II—Contested Coverage Cases," 15 G'town J. Legal Ethics 29 (2001) (with Ellen S. Pryor).

25. "A Critique of *Burrow v. Arce*," 26 Wm. & Mary Envir. L. & Policy Rev. 323 (2001) (invited symposium).

26. "You Get What You Pay For: Result-Based Compensation for Health Care," 58 Wash. & Lee L. Rev. 1427 (2001) (with David A. Hyman).

27. "The Case for Result-Based Compensation in Health Care," 29 J. L. Med. & Ethics 170 (2001) (with David A. Hyman).

28. "Defense Lawyers' Professional Responsibilities: Part I—Excess Exposure Cases," 78 Tex. L. Rev. 599 (2000) (with Ellen S. Pryor).

29. "What's Not To Like About Being A Lawyer?," 109 Yale L. J. 1443 (2000) (with Frank B. Cross) (review essay).

30. "Due Process and the Lodestar Method: You Can't Get There From Here," 74 Tul. L. Rev. 1809 (2000) (invited symposium).

31. "The Aggregate Settlement Rule and Ideals of Client Service," 41 S. Tex. L. Rev. 227 (1999) (with Lynn A. Baker) (invited symposium).

32. "Representative Lawsuits & Class Actions," in Int'l Ency. Of L. & Econ., B. Bouckaert & G. De Geest, eds., (1999) (peer-reviewed).

33. "Preliminary Thoughts on the Economics of Witness Preparation," 30 Tex. Tech L. Rev. 1383 (1999) (invited symposium).

34. "The Lost World: Of Politics and Getting the Law Right," 26 Hofstra L. Rev. 773 (1998) (invited symposium).

35. "Flat Fees and Staff Attorneys: Unnecessary Casualties in the Battle over the Law Governing Insurance Defense Lawyers," 4 Conn. Ins. L. J. 205 (1998) (invited symposium).

36. "I Cut, You Choose: The Role of Plaintiffs' Counsel in Allocating Settlement Proceeds," 84 Va. L. Rev. 1465 (1998) (with Lynn A. Baker) (invited symposium).

37. "And Such Small Portions: Limited Performance Agreements and the Cost-Quality/Access Trade-Off," 11 G'town J. Legal Ethics 959 (1998) (with David A. Hyman) (invited symposium).

38. "Mass Lawsuits and the Aggregate Settlement Rule," 32 Wake Forest L. Rev. 733 (1997) (with Lynn A. Baker) (invited symposium).

39. "Professional Liability Insurance as Insurance and as Lawyer Regulation: A Comment on Davis, Institutional Choices in the Regulation of Lawyers," 65 Fordham L. Rev. 233 (1996) (invited symposium).

40. "All Clients are Equal, But Some are More Equal than Others: A Reply to Morgan and Wolfram," 6-3 Coverage 47 (May/June 1996) (with Michael Sean Quinn).

41. "Are Liability Carriers Second-Class Clients? No, But They May Be Soon-A Call to Arms against the Restatement of the Law Governing Lawyers," 6-2 Coverage 21 (Jan./Feb. 1996) (with Michael Sean Quinn).

42. "Bargaining Impediments and Settlement Behavior," in Dispute Resolution: Bridging the Settlement Gap, D.A. Anderson, ed. (1996) (with Samuel Issacharoff and Kent D. Syverud).

43. "The Legal Establishment Meets the Republican Revolution," 37 S. Tex. L. Rev. 1247 (1996) (invited symposium).

44. "Do We Know Enough About Legal Norms?" in Social Rules: Origin; Character; Logic: Change, D. Braybrooke, ed. (1996).

45. "The Professional Responsibilities of Insurance Defense Lawyers," 45 Duke L. J. 255 (1995) (with Kent D. Syverud), reprinted in Ins. L. Anthol. (1996) and 64 Def. L. J. 1 (Spring 1997).

46. "Wrong Turns on the Three Way Street: Dispelling Nonsense About Insurance Defense Lawyers," 5-6 Coverage 1 (Nov./Dec.1995) (with Michael Sean Quinn).

47. "Introduction to the Symposium on Bad Faith in the Law of Contract and Insurance," 72 Tex. L. Rev. 1203 (1994) (with Ellen Smith Pryor).

48. "Does Insurance Defense Counsel Represent the Company or the Insured?" 72 Tex. L. Rev. 1583 (1994), reprinted in Practising Law Institute, Insurance Law: What Every Lawyer and Businessperson Needs To Know, Litigation and Administrative Practice Course Handbook Series, PLI Order No. H0-000S (1998).

49. "Thoughts on Procedural Issues in Insurance Litigation," VII Ins. L. Anthol. (1994).

50. "A Model Retainer Agreement for Legal Services Programs: Mandatory Attorney's Fees Provisions," 28 Clearinghouse Rev. 114 (June 1994) (with Stephen Yelenosky).

51. "Incoherence and Irrationality in the Law of Attorneys' Fees," 12 Tex. Rev. of Litig. 301 (1993).

52. "A Missed Misalignment of Interests: A Comment on Syverud, The Duty to Settle," 77 Va. L. Rev. 1585 (1991), reprinted in VI Ins. L. Anthol. 857-870 (1992).

53. "Unloading the Lodestar: Toward a New Fee Award Procedure," 70 Tex. L. Rev. 865 (1992).

54. "Comparing Class Actions and Consolidations," 10 Tex. Rev. of Litig. 496 (1991).

55. "A Restitutionary Theory of Attorneys' Fees in Class Actions," 76 Cornell L. Rev. 656 (1991).

56. "Elmer's Case: A Legal Positivist Replies to Dworkin," 6 L. & Phil. 381 (1987) (peer-reviewed).

57. "Justice In Settlements," 4 Soc. Phil. & Pol. 102 (1986) (with Jules L. Coleman) (peer-reviewed).

58. "Negative Positivism and the Hard Facts of Life," 68 The Monist 347 (1985) (peer-reviewed).

59. "Utilitarian Participation," 23 Soc. Sci. Info. 701 (1984) (peer-reviewed).

60. "Public Opinion and the Federal Judiciary: Crime, Punishment, and Demographic Constraints," 3 Pop. Res. & Pol. Rev. 255 (1984) (with Robert Y. Shapiro) (peer-reviewed).

AWARDS

Faculty Research Grant, University of Texas, 2005-06

Fellow, Texas Bar Foundation, Elected 1998

Texas Excellence in Teaching Award, 1997

BRAVO Award, State Bar of Texas, 1995

Felix S. Cohen Prize for Legal Philosophy, Yale Law School, 1987

Olin Foundation Grant for Study of Class Actions, Yale Law School, 1986

National Science Foundation Graduate Fellowship, 1980-1983

NOTED ACTIVITIES

Guest Columnist, TortDeform.com

Associate Reporter, American Law Institute Project on Aggregate Litigation (2003-present)

Member, Grants Subcommittee, Law School Admissions Council (2005-2007)

Invited Academic Member, American Bar Association/Tort & Insurance Practice Section Task Force on the Contingent Fee (2003-2007)

Co-Reporter, Project on the Professional Responsibilities of Insurance Defense Lawyers, International Association of Defense Counsel (1994-2002)

Chair, Chair-Elect, and Treasurer, Section on Insurance Law, Association of American Law Schools (1997-1999)

Member, Executive Committee, Section on Professional Responsibility, Association of American Law Schools (1994-1997)

Program Chair, Joint Program on the Professional Responsibilities of Lawyers for Insurance Companies, sponsored by the Insurance and Professional Responsibility Sections of the Association of American Law Schools (1996)

Member, Special Master's Team, *Cimino v. Raymark Industries* (1989)

Member, State Bar of Texas (admitted 1988)